GUARDIANSHIP:

THE SOLUTION TO A HOST OF PROBLEMS

DEDICATED TO THE LILLIANS, SAMS, MARYS AND RUBYS IN OUR SOCIETY

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LILLIAN

The Lillian Hess Inquest - who died at age 72 weighing 54 lbs.

SAM

who was attacked and injured on the street, hospitalized, but refused further hospitalization when injury complications set in.

MARY

who suffered severe frostbite in her unheated home.

RUBY

found to be "mentally incompetent" and beaten and neglected by her daughter.

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FOREWORD

Having been a member of the previous Mayor's Task Force on Disabled and Elderly Persons and subsequently appointed to chair the recently established Mayor's Committee on Aging, I have been pleased to be able to contribute much of my time and experience as a concerned citizen of this province to issues affecting our aging population.

One of the most pressing issues is the lack of clearly defined laws and regulations pertaining to the rights of elderly people to make decisions about their own lives: their housing, their health care and support, their financial concerns, and so on. However, this issue seems to have a low priority for provincial authorities.

With the support of the Mayor's Committee, a working group, which includes professionals in the fields of journalism, medicine, law and social work has been established. This Brief has been prepared as an introduction to action on the issue.

Please read these few pages. We hope you will be encouraged to join us in taking a constructive and responsible approach in this matter. The Government of this Province must be urged to consult with constituents and take action by preparing comprehensive guardianship legislation.

There will always be certain risks inherent in the aging process, but good guardianship legislation could do much to minimize these, while still preserving the dignity of the individual.

Ivy St. Lawrence
Chairperson
Mayor's Committee on Aging
City of Toronto

INTRODUCTION

In their experience, the members of the Committee have been witness to a great number of fragile and otherwise vulnerable individuals who live in lingering jeopardy; individuals who, to all intents and purposes, are unprotected despite those incompetency statutes and systems which nominally exist for their benefit.

Today, there are thousands of adults who live virtually invisibly among us and who lack either the ability to recognize their jeopardy or the foresight, opportunity, hope, courage or means to protect themselves from it.

There are the "deinstitutionalized", who have been abandoned by the institutions which formerly cared for them. Many others have been widowed and left with only the faded and tattered endowment of their previous better lives. Others have lived alone robustly for most of their adult lives but now, due to increasing age and enfeeblement, are no longer self-reliant.

In former times, families made room and cared for their fragile and needy members. Today more often than not, relatives no longer view themselves as responsible for such a role. Historically, the care of such persons has only recently shifted to the state. Yet in a twinkling of time, government has created a bureaucracy in which the assets of the individual are more important than the humanity of the individual.

The grim knowledge that many among us live within the shadow but not the shelter of our society confronts us repeatedly. The electronic and print media bring many similarly distressing circumstances to our attention. In the seeing, in the reading, and in the hearing, each of us has recognized any number of points along the way when common sense and compassion could and should have intervened to relieve such lives from their miserable outcomes.

While we would all insist that those who genuinely need protection should receive it, there are many impediments to the fulfillment of this most fundamental and civilized wish. Therefore this brief will look at four specific cases, review the existing legislation intended to help such people and conclude with recommendations for action. (See Appendix for the histories of Lillian, Sam, Mary, and Ruby)

EXISTING STATUTES

There are many Ontario statutes that have to be considered. Under existing legislation, there is no middle ground: it is an "all or nothing" situation. It does not address the needs of those requiring some intervention. The existing legislation is not adequate. Some people have reached the point of near-death before helpers could legally go in. We are looking at the deficiencies in the existing legislation and proposing alternatives.

It is necessary to encourage the provincial government to address this situation, recognizing the need for a balance between intervention and recognition of individual choice and human rights.

The Mental Health Act

Admittance under this Act requires that the elderly person must be considered to be suffering from a mental disorder, i.e., a mental "disease" or "disability". A serious gap in service results from the diagnostic gray areas dividing mental and physical illness. As a result, the same symptoms in an elderly person may be judged differently by medical or mental health institutions, and the person gets assistance from neither.

Sections 9, 10 and 11 are those pertinent to the process of involuntary committal. Section 9 describes the circumstances under which application by a physican for psychiatric assessment may be signed as a first step to involuntary civil commitment. The description of circumstances in Section 9 is still considered by many health professionals to be ambiguous and a barrier to acting decisively.

Section 10 sets out the procedure before the Justice of the Peace who has the discretion to issue an Order for Assessment. After this order is issued, a person may be forced to submit to an examination by a physician. Section 11 empowers a constable or other peace officer, under certain circumstances, to take the elderly person into custody and then to an appropriate place for initial assessment by a physician (In Totonto usually to the Queen Street Mental Health Centre).

Service providers report that, in practical terms, it is usually very difficult to use Sections 10 and 11. Even when the facts of the situation seem to meet the standard set by the statute, justice officials do not seem to be clear about the extent of their powers or responsibilities and are hesitant to make decisions about the care and hospitalization of elderly persons under Sections 10 and 11.

The Mental Incompetency Act

The present Act sets up an "all or nothing" format for declaring someone to be a "mentally incompetent person". Presently, the Act does not take into account degrees of competence in an area, or competence in certain areas but not in others. Anyone may apply to a court to be appointed or to have someone else appointed committee (guardian) of the "person" of an individual and/or the "estate" of an individual. Once a person is found to be mentally incompetent, then that individual is considered to require "care, supervision and control" in all respects.

The Public Health Act

Powers of intervention under this Act extend to situations where a person maintains premises in a manner which may be considered to be a "nuisance" to the community or where there is "reasonable ground" to believe it is necessary to enter for the public good.

Several sections of this Act are used by Public Health authorities to order improvement in the living conditions of seniors known as "hoarders". Two practical problems arise. Firstly, although the occupant is responsible for the mess, the burden of paying for clean-up falls on the owner of the property, even though he/she may not be the occupant responsible for the condition. Secondly, the hoarder's pattern of behaviour is often repetitive, requiring the repeated involvement of public health officials.

It is hoped that the new Health Protection Act, once proclaimed and operative, will rectify some of these problems. However, powers of intervention still need to be more clearly defined through amendments to guardianship legislation.

PROPOSED GUARDIANSHIP LEGISLATION

There are numerous proponents of new guardianship legislation. The Ontario Advisory Council on Senior Citizens is on record proposing a new Guardianship Act "which would provide for a court supervised procedure for the protection of 'adults in need of protection' by means of a partial or complete guardianship, which is both temporary and flexible."

In response to Toronto City Council's concern over the death of Miss Lillian Hess, a comprehensive report dated May 12, 1981 was submitted to the Neighbourhoods Committee, with recommendations including:

> That Council support the introduction of a provincial Guardianship Act which provides for partial or complete guardianship, and can be flexible in its application.

This recommendation was adopted and forwarded to the Province.

In October 1981, members of the Subcommittee on Aging of the Mayor's Task Force on Disabled and Elderly Persons supported the proposed Guardianship Act set out by the Ontario Advisory Council for Senior Citizens.

More recently the Medical Officer of Health for the City of Toronto made a recommendation which was adopted by the Local Board of Health and the Mayor's Committee on Aging, supporting the "introduction of new guardianship legislation providing for partial as well as complete guardianship in the context of the least restrictive alternative."

Considerable policy discussion among the three Provincial Ministries which would be responsible for introducing guardianship legislation - the Attorney General, Community and Social Services, Health, has taken place through an Interministerial Committee. This Committee has completed its report to the Ministries but has not released it publically, and the report was not made available when requested by the Chairperson of the Mayor's Committee on Aging.

The ministry with the authority to take initiative in this area is the Ministry of the Attorney General. It is clear that a greater commitment must be made by the Attorney General to develop a guardianship model based on the least restrictive alternative. Citizens concerned about this issue must look to this ministry for response.

If we genuinely intend that adults at risk should no longer be unprotected, then many obstacles must be overcome. Given the severe deficiencies in the current guardianship laws, these obstacles can only be addressed by the enactment of a much more comprehensive statute, with adequate appropriations.

Key Provisions

While it is not the function of this committee to write the pertinent legislation, this being the responsibility of the government, such legislation should include the following key provisions:

a) Applicable to All Ages

That it apply to all ages in need who are not otherwise protected under other provisions of law.

b) Sustained Public Awareness

That sufficient publicity be given to the problem and the potential service to heighten public sensitivity. This

would encourage requests by those in need and the reporting of instances by those who are aware of them.

c) Mandatory Reporting

That a responsibility to report apparent instances of individuals in need be clearly defined, similar to the requirement in The Child Welfare Act.

d) Immunity

That all acts made in good faith in furtherance of the statute's purposes and in accordance with its provisions should be immune from civil and criminal liability.

e) Acceptance of Services

That every reasonable effort be made to secure the consent and cooperation of those individuals who are found to be in need of such services.

f) The Right to Counsel

That independent counsel be provided at no cost to represent the interests of individuals who do not desire to be made involuntary recipients through the courts. That the right to counsel be ensured, including provision of independent council to represent the interest of individuals who are not able to retain counsel privately.

g) The Least Restrictive Alternative

At present in Ontario, once guardianship is granted, it covers all aspects of "care, supervision and control".

Partial Guardianship

In essence, partial or limited guardianship occurs when a judge exercises discretion to place limitations on the power of a guardian because the subject of the guardianship order is competent in certain areas but not in others. There is a demonstrated trend in the United States toward new legislation which empowers judges to exercise such discretion. In Canada, the Provinces of Alberta and Newfoundland have enacted similar legislation.

It seems logical that if policies placing maximum reliance on community-based forms of care are to be effectively implemented, then forms of guardianship with limitations on power must be tailored to respect an individual's actual capabilities. Guardianship legislation must not be seen as the cure-all. We come to the question of whether guardianship legislation can help

to provide better services along the continuum of care which stretches from an individual's complete independence to institutionalization in a chronic care facility.

CONCLUSIONS

Individual Rights

Proponents of guardianship legislation have referred to the need to balance statutory powers of intervention with respect for individual rights without exploring this concept in any detail.

It should be borne in mind that in cases in which services have been refused and service providers are convinced it is desirable to impose the care, we are really discussing involuntary guardianship, be it partial or complete. Therein lies the concern as to civil or human rights.

Due Process

Initially every reasonable effort should be made to secure the consent and cooperation of those who are found to be in need of protection. However, in the absence of such consent, legislation should contain a balancing of governmental and individual interests by ensuring that the subject of the proceedings is always accorded "due process". In common sense terms, this means that the person must be treated fairly. Therefore certain protections must be spelled out in the legislation rather than left subject to judicial discretion. A hearing should not be one-sided. The right to appeal and the process of appeal should be set out in the statute.

Serious attention needs to be paid to the role of the Public Trustee. In Ontario, it is not clear whether a person without financial means can choose counsel or whether the person must accept representation by the court appointed Public Trustee. We have grave reservations about any proposal to extend the power or role of the Office of the Public Trustee in its present structure.

Definitions

Definitions as to who is eligible for "protection" are crucial. A broad definition casts a broad net. For example, the Ontario Advisory Council on Senior Citizens has proposed the following draft definition:

> In determining whether or not a person (is a person) who is an 'adult in need of protection' thus rendering him/her at risk within his/her environment, consideration shall be given to the following:

a. Is he/she unable to maintain himself/herself in daily living?

b. Does he/she have any psycho-social problems, such as severe memory loss?

c. Is he/she able to handle his/her own financial affairs?

d. Is he/she in need of legal protection?

e. Does he/she require protection from economic exploitation?

f. Does he/she have any medical or functional problems making him/her unable to cope with his/her environment.

In Ontario at the present time, it is not sufficient grounds for intervention to be able to show that there is a threat to the person's health; the threat must result from an apparent mental disorder.

An important distinction must be drawn between definitions used currently in Ontario (The Mental Incompetency Act and Mental Health Act) whereby the showing of mental disorder is a prerequisite. In the alternative definitions quoted above there is no requirement to show mental disorder. In all of these definitions, a standard of "inability to manage" personal or financial affairs "due to any cause" is explicitly adopted. The current Ontario definitions apply to a much smaller segment of the population than would these broader definitions. While we are convinced of the need for new guardianship definitions, we are equally convinced that such definitions must allow for considerable personal freedom.

The Impact of Guardianship Legislation

A very practical point needs to be made here. Even with statutory provisions allowing partial guardianship as a means of facilitating community-based care, the trend toward institutionalization will continue, as long as community-based care options exist primarily on paper. Legislative reform without policy and program changes will serve only to deflect awareness from the main source of our social system's inadequacy in serving the elderly at risk. Only if the provincial Government implements much more comprehensive and flexible chronic home care, acute home care and homemaker service programs will there truly be a choice between institutionalization and the security of living in one's own home in later years. Although the focus of this brief is the pressing need for revised guardianship legislation, we recognize that the gap created by undeveloped and underdeveloped alternatives to institutionalization must be filled.

RECOMMENDATIONS

It is evident that if the Ministry of the Attorney General considered guardianship legislation a priority, it would be possible to create a means to protect adults at risk in Ontario. Such legislation could maintain the balance between personal autonomy and respect for human lives.

We therefore recommend:

1. That the Attorney General be requested to make public the existing draft guardianship legislation.

2. That the Attorney General engage in public consultation relating to the draft guardianship legislation.

3. That the Ontario government commit itself to adopting guardianship legislation which would respect individual rights while permitting necessary intervention for the protection of adults at risk.

Responses should be directed to:

Mrs. Ivy St. Lawrence
Chairperson
Mayor's Committee on Aging - City of Toronto
c/o 80 St. Clair Avenue East, Apt,1503
Toronto, Ontario M4T 1N6

LILLIAN

The name, Lillian Hess, has become synonomous with elderly at risk. Her death is the most publicized in recent years, primarily because of the numbers and status of people who were aware of her situation and yet she died at age 72 of malnutrition.

Miss Hess suffered persistent episodes of senile dementia. She became increasingly confused about her financial affairs, was unable to maintain her house adequately, and neglected her personal hygiene. Although Miss Hess had a friend residing with her, the friend did not provide the required services for her.

Several people had provided assistance to Miss Hess over the years. However, during the last 18 months of her life she refused help both from friends and professionals.

Her increasing confusion seems to have resulted in increasing distrust. It was the conclusion of the coroner's jury that Miss Hess's confusion and stress, "over 18 months led to a feeling of despondency, with a loss of desire to live culminating in a rapid deterioration of the deceased, leading to her ultimate hospitalization and death".

MARY

Mary is a woman in her mid-eighties who had a long-standing involvement with Public Health.

She lived in her own home in downtown Toronto with 12 dogs. Her home had neither running water nor central heating. She chopped her own wood and slept in the same area as the stove. The premises were littered with garbage generating strong odours. Mary was unresponsive to legal orders requiring her to carry out necessary cleaning and repairs.

Although Mary's lifestyle was not within the norm, service providers, including a psychiatrist, did not consider her to be mentally incompetent under the Mental Incompetency Act or certifiable under the Mental Health Act.

On an extremely cold day in Janaury, 1982, Mary awoke one morning in subzero weather and discovered she had no chopped wood. The public health nurse had given Mary both her home and work number, but Mary was unable to find it. Mary was found by the person delivering her Meals-On-Wheels, who phoned Public Health. The nurse called a representative from the Fire Department who brought some wood to Mary from his own home. Mary's death was averted, but she had to be hospitalized due to severe frostbite.

Mary has now begun to co-operate fully with her service providers, including public health nurse, the public health inspector and the Estates Officer from the Public Trustee.

RUBY

Ruby is an 82 year old woman with a medical history of senile dementia and strokes. In 1978, she was found to be a mentally incompetent person and since then, her estate has been controlled by the Public Trustee. Ruby resided with her daughter, who although not officially named guardian, exercised control over her mother's care.

Community police records indicated a history of beatings. Ruby stated that she feared for her life, home and possessions. The police noted a considerable deterioration in Ruby since she had first come to their attention. The public health nurse had observed the daughter inebriated and being verbally abusive.

Ruby had been seen at a local hospital's emergency department with injuries she claimed were caused by her daughter. The daughter denied the accusations. Having been found to be a mentally incompetent person, any testimony which Ruby might give in court could not be considered sufficient to form the basis of charges.

Ruby's condition continued to deteriorate. She became incontinent in bowel and bladder. At the time of her last admission to a nursing home, she was found to be dehydrated and malnourished with bruises.

The public health nurse requested the Office of the Public Trustee to obtain the authority to act as committee of Ruby's person. This was done. Ruby was removed from her daughter's home and permanently placed in a nursing home.

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CITY OF TORONTO
THE MAYOR'S COMMITTEE ON AGING

D & E
March 24, 1983

To: Neighbourhoods Committee

Subject: Guardianship Legislation

Origin: The Mayor's Committee on Aging (guardianship:112)

Comments:

Attached is the position paper, "Guardianship: A Solution to a Host of Problems". It is our intention to distribute this to seniors and other agencies in an effort to encourage discussion and enlist support. We feel this is an important issue that requires a thorough public discussion.

City Council has previously adopted a recommendation:

> "That Council support the introduction of a provincial Guardianship Act which provides for partial or complete guardianship, and can be flexible in its application."

We understand that the legislation has been drafted but is not being brought forward. We are concerned either that there is no intention of passing such legislation or that the legislation may be adopted without adequate public consultation. We understand the difficulties inherent in such legislation, but feel that the process we are recommending to the Attorney General is the one most likely to result in reasonable legislation.

Recommendations:

1. That Council endorse the recommendations in this report and support our efforts to meet with the Attorney General.

2. That Council authorize broad distribution of this document.

Ivy St. Lawrence
Chairman

MB/mj

Encl.